



CTIA

Building The Wireless Future™

Cellular Telecommunications & Internet Association

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December 31, 2003

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
12th Street Lobby, TW-A325
Washington, DC 20554

Re: *Ex Parte Presentation*
CC Docket No. 99-200

Dear Ms. Dortch:

On behalf of the Cellular Telecommunications & Internet Association ("CTIA"), I am writing to respond to certain statements made in the December 2, 2003, Reply Comments filed by the California Public Utilities Commission ("CPUC") suggesting that CMRS customers could be included in the two specialized overlays ("SOs") proposed by the Commission.¹ The possibility that CMRS customers could be included in any new California SOs was not discussed in either the Petition or the Public Notice seeking comment on the Petition. Accordingly, any move to include it now would violate provisions of the Administrative Procedure Act ("APA") mandating notice and comment prior to any significant rule or policy changes, and should be squarely rejected by the Commission.

On October 6, 2003, the CPUC filed a Petition with the Commission requesting authority to implement two SOs that would cover the entire State of California.² In the Petition, the CPUC stated that the SOs would cover "all 'transparent' or 'non-geographic based' numbers, *except for cellular services*, that would otherwise be assigned to the underlying numbering plan areas (NPAs)."³ On October 16, 2003, the Commission issued a Public Notice seeking public comment on the petition. In the Public Notice, the Commission specifically stated that: "The Petitioners state that numbers for "cellular

¹ See Reply Comments of the California Public Utilities Commission and of the People of the State of California on its Petition for Authority to Implement Specialized Overlay Area Codes, CC Docket Nos. 99-200, 96-98 (filed Dec. 2, 2003) (hereinafter "CPUC Reply Comments").

² See Petition of the California Public Utilities Commission and of the People of the State of California for Authority to Implement Specialized Overlay Area Codes, CC Docket Nos. 99-200, 96-98 (filed Oct. 6, 2003).

³ *Id.* at 2.



services” *will not* be included in the SOs.”⁴ Notwithstanding both of these statements, however, the CPUC now apparently believes that the imposition of SOs on CMRS customers is somehow appropriate, and notes in its reply comments that “the CPUC certainly would not object to including them in the SOs.”⁵

Under Section 552(a)(1) of the APA, an agency must publish in the Federal Register “rules of procedure . . . substantive rules of general applicability. . . statements of general policy or interpretations of general applicability. . . and. . . each amendment, revision, or repeal of the foregoing.”⁶ In this case, notice of the CPUC Petition was not published in the Federal Register. Instead, interested parties were only notified through a Wireline Competition Bureau Public Notice, which specifically stated that “cellular services” would not be included in any overlay.

Furthermore, CTIA notes that any Commission Order allowing the CPUC to impose an SO or number “take-backs” on California wireless customers would constitute a major change in Commission policy. In the *Numbering Resource Optimization Third Report and Order*, the Commission stated that it would “likely oppose technology-specific overlays that would include take-backs of numbers that are geographically sensitive.”⁷ In addition, the Commission also stated that “take-backs have significant drawbacks and costs, which need to be considered in determining whether a [SO] should include take-backs.”⁸ In this case, however, interested parties have never had a chance to comment on the CPUC’s apparent desire to include CMRS customers in new SOs because that option was never included in any Public Notice requesting comments in this proceeding.

⁴ *Public Notice, Wireline Competition Bureau Seeks Comment on the Petition of the California Public Utilities Commission and of the People of the State of California for Authority to Implement Specialized Overlay Area Codes*, CC Docket No. 99-200, DA 03-3262 (rel. Oct. 16, 2003).

⁵ CPUC Reply Comments at 4-5.

⁶ 5 U.S.C. § 552(a)(1).

⁷ *Numbering Resource Optimization, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200*, 17 FCC Rcd, 252, 292 (2001) (hereinafter “Numbering Resource Optimization Third Report and Order”).

⁸ *Id.* at 291.

In *Sprint v. FCC*,⁹ the United States Court of Appeals for the District of Columbia Circuit addressed an almost identical set of facts. In that case, the Common Carrier Bureau issued a Public Notice seeking general comment on a Petition involving clarification of certain payphone compensation responsibilities. The Bureau did not, however, “publish the Notice in the Federal Register or issue a notice of proposed rulemaking.”¹⁰ As a result, parties participating in the proceeding filed comments on the issue of clarifying existing rules, and did not address the larger question of changing the existing payphone compensation rules.¹¹ Two years after issuance of the Notice, however, the Commission issued an Order that substantially changed the payphone compensation methodology.¹² In vacating and remanding the Order to the Commission, the D.C. Circuit held that the “Commission’s ‘utter failure’ to afford proper notice and comment was not harmless” and stated that the Commission “must conform its conduct to the APA notice requirement.”¹³

With regard to the CPUC Petition, any decision granting the CPUC authority to impose SOs or number take-backs on CMRS customers in the State of California would almost certainly meet the same fate as the payphone compensation rules that were vacated in the *Sprint* case. Accordingly, CTIA urges the Commission to reject the CPUC’s contention that SOs involving CMRS customers could be imposed in the context of this proceeding.

Respectfully submitted,



Michael Altschul

⁹ 315 F.3d 369 (2003).

¹⁰ *Id.* at 372.

¹¹ *Id.*

¹² *Id.* at 373.

¹³ *Id.* at 377.